



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Ray Brillinger and the Canadian Lesbian and Gay Archives dated June 3, 1996 alleging discrimination based on sexual orientation and/or association with individuals identified by sexual orientation by the Personal Respondent Scott Brockie and the Corporate Respondent Imaging Excellence.

B E T W E E N:

Ontario Human Rights Commission

- and -

Ray Brillinger and the Canadian Lesbian and Gay Archives

Complainants

- and -

Scott Brockie and Imaging Excellence Inc.

Respondents

INTERIM DECISION

Adjudicator : Heather M. MacNaughton

Date : September 29, 1999

Board File No: BI-0179-98

Decision No : 99-012

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission)	Jennifer Scott and Anthony Griffin
)	
)	

Ray Brillinger and Canadian Lesbian)	Chris Bondy
and Gay Archives, Complainants)	
)	

Scott Brockie and Imaging Excellence Inc.,)	Philip B. McMullen
Respondents)	
)	

The Complainants Ray Brillinger ("Brillinger") and the Canadian Lesbian and Gay Archives (the "Archives") allege that they were discriminated against in the provision of services on the basis of sexual orientation in breach of s. 1 of the Ontario *Human Rights Code*, R.S.O. 1990 c. H.19 as amended (the "*Code*"). The relevant portions of s. 1 of the *Code* provide that every person has a right to equal treatment with respect to services and goods without discrimination because of sexual orientation. Section 9 of the *Code* prohibits direct and indirect discrimination on all prohibited grounds including sexual orientation. Brillinger and the Archives further allege that they were discriminated against on the basis of association pursuant to s. 12 of the *Code*.

In an interim decision delivered orally on February 19, 1999, I corrected a technical deficiency on the form of the complaint and recognized the Archives as a complainant, on the basis that the complaint contained allegations of discrimination against it.

The Facts

I heard evidence from three witnesses: Dr. Robin Brownlie, a member of the Board of Directors of the Archives and its current vice president; Brillinger; and Scott Brockie ("Brockie"), the personal Respondent and the President of the Corporate Respondent Imaging Excellence Inc. ("Imaging Excellence"). For the most part, I have not attributed evidence to a particular witness because the facts in this case were not significantly in dispute.

The Archives is a corporation whose mandate is to acquire, preserve, organize and give public access to information, records and artifacts, by and about lesbians and gay men in Canada. It is run on a volunteer basis by and for lesbians and gay men and, while membership is not restricted to that community, you must be a lesbian or a gay man to sit on the Board of Directors. It is the second largest lesbian and gay archives in the world. Dr. Brownlie testified that the purpose of the Archives is to celebrate the lives of lesbians and gay men and to ensure that their records and histories are not lost or wilfully erased. She said the Archives help lesbians and gay men live "free, proud and positive lives".

On April 4, 1996, as the then president of the Archives, Brillinger sought a quote for the printing of Archives envelopes, letterhead and business cards from Imaging Excellence. The request was made to Brockie, who was willing to provide the quote and carry out the service, until he learned the name of the organization which Brillinger represented.

On learning that Brillinger was requesting the service on behalf of a gay and lesbian organization, Brockie refused to quote on, or to provide, the printing service. He testified that he is a born again Christian and that he refused the work on the basis of his deeply held conviction that homosexuality is contrary to the teachings of the Christian Bible. In particular, he relied on two verses from the book of Leviticus, which describe homosexuality as "detestable". Neither of the Complainants disputed that Brockie's belief was sincerely held. Certainly, his sincerity was apparent from the manner in which he delivered his evidence.

As a result of the denial, the Archives were required to locate another source for the printing services and there was a resultant delay in the production of the materials.

The Issues

The facts outlined above raise a number of legal issues:

- a) Are the Archives a "person" protected by s. 1 of the *Code*?
- b) If so, was the printing service denied to the Archives on the basis of sexual orientation?
- c) Was the printing service also denied to Brillinger on the basis of sexual orientation?
- d) Is Imaging Excellence responsible for the conduct of Brockie if a breach of the *Code* occurred?

Are the Archives a “person” protected by Section 1 of the *Code*?

Counsel for the Ontario Human Rights Commission (the “Commission”), and Counsel for the Archives, both submit that the definition of “person” in s. 46 of the *Code*, by incorporating s. 19 of the *Interpretation Act* R.S.O. 1990 c. I. 11, extends the protections in the *Code* to corporations. Section 46 of the *Code* defines “person” to include an employment agency, and employers’ organization, an unincorporated association ... in addition to the extended meaning given to it by the *Interpretation Act*.

Section 19 of the *Interpretation Act* defines “person” as:

“person” includes a corporation and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law.

Counsel for the Commission and for the Archives submit that this definition is conclusive of this issue. Counsel for the Respondents argues that the qualifying language in s. 19 “to whom the context can apply according to law,” must modify the inclusion of a corporation in s. 1 of the *Code*. He submits that, in the context being considered here, a corporation cannot have a sexual orientation, which, he submits, is a purely human characteristic.

I find that the wording of s. 19, through the inclusion of the broader definition of person in the *Interpretation Act*, clearly intended extension of the protections in the *Code* to corporations in circumstances where such inclusion is appropriate. This inclusion is consistent with a broad and purposive interpretation of the *Code*. Brockie’s reason for refusing to provide the printing services was the sexual orientation of either the members of the Archives, or the sexual orientation of the community it serves. That is discrimination against the Archives because of sexual orientation.

There are organizations so imbued with the identity or character of their membership, or so clearly representative of a group that is identified by a prohibited ground under the *Code*, that they cannot be separated from their membership and the organization itself

takes on the protected characteristic. The Archives are such an organization. There are many other examples of such organizations, which could be considered to be identified by a prohibited ground of discrimination, such as ethnic origin or race. In my view it is likely that they too would take on the protected characteristic of the group they represent.

A similar finding was made by this Board in *Kafato v. Halton Condominium Corporation No. 4* (1991), 14 C.H.R.R. D/154 where the adjudicator said at D/159:

It is clear from the prohibited grounds of discrimination listed in section 2(1) that - this section is intended primarily to protect individuals and not corporations. However, this protection also extends to corporations, when, as in this case, the corporation exists solely for the benefit of persons who are identified by a prohibited ground of discrimination.

While Counsel for the Respondents argued that the *Kafato* case should be limited to the particular facts in that case, I adopt its reasoning which, in my view, accords with a broad and purposive interpretation of the *Code*. To hold otherwise would be to permit these Respondents to discriminate indirectly against the lesbians and gay men, who are members of the Archives, by discriminating against the corporate entity which was founded by them and for their benefit. If the Respondents' arguments were accepted they would lead to the absurd result that discrimination, which is prohibited against lesbians and gay men in their individual capacities, would be permitted should these same individuals form an association to promote their acceptance in society and to alleviate historic systemic discrimination.

Was the printing service denied to the Archives on the basis of sexual orientation?

Brockie testified that he refused to quote on, or to provide, the services requested by the Archives after seeing the proofs and reaching a conclusion regarding the mandate of the Archives. I find that his refusal was because the material clearly referred to gays and lesbians. In light of my finding that the Archives was itself identified by a sexual orientation, this refusal was directly discriminatory contrary to ss. 1 and 9 of the *Code*.

However, if I am wrong in my analysis, I further find that Brockie's actions were contrary to s. 12 of the *Code*. Section 12 prohibits discrimination by association where

the discrimination occurs because of a relationship, association or dealing with a person or persons identified by a prohibited ground of discrimination. Brockie's refusal to provide printing services to the Archives constituted discrimination against it as a result of its association with its lesbian and gay membership or community.

Perhaps the best evidence of the strength of that association was that of Brockie, who, upon hearing the name of the Archives, and seeing the proofs of the letterhead and business cards, was able to reach a conclusion as to the nature of the organization Brillinger represented. Further, without any inquiry into the nature, membership or mandate of the Archives, he was able to conclude that providing services to the Archives would violate his religious beliefs. Brockie refused to provide the service because the materials openly stated that the organization involved the lesbian and gay community.

Was the Printing Service denied to Brillinger on the basis of sexual orientation?

Counsel for the Respondents submitted that Brillinger's complaint should be dismissed because, to the extent that a service was denied, it was denied to the Archives and not to Brillinger himself. Both counsel for the Commission and for the Archives submit that this narrow application of the *Code*, would be contrary to well-established human rights principles ensuring a broad and purposive interpretation of human rights statutes, which have been held to be quasi-constitutional.

The Respondents were aware that Brillinger, when he sought the printing service, represented the Archives. Brillinger's evidence, which was not disputed, was that he was there on behalf of his organization. The Respondents' argument fails to consider that Brillinger, as a member and the then president of the Archives, was indirectly discriminated against when the service was denied to the Archives. Further, Brillinger was discriminated against because of his association with the Archives pursuant to s. 12.

It was Brockie's evidence that Imaging Excellence did not deny printing services to individuals who were known to it to be lesbians or gay men. Accepting his evidence on this point, I can conclude that, if Brillinger as a gay man, sought personal printing

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services for a purpose unrelated to the Archives, he would have received the service. The only reason for the denial was the direct association between Brillinger and his organization, the Archives.

In any event, when Brockie denied the printing service, it was Brillinger who received that message, and he who personally experienced the hurt and degradation of being rejected as a result of the position taken by Brockie.

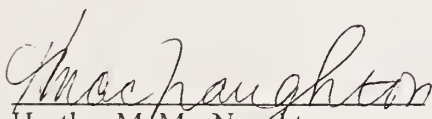
I therefore find that Brillinger was discriminated against contrary to ss. 1, 9 and 12 of the *Code*.

Is Imaging Excellence responsible for the conduct of Brockie?

It was not disputed that Brockie was the president of Imaging Excellence and its top salesperson. He clearly acted on behalf of Imaging Excellence when he denied the service and, in so doing, he was the directing mind of the corporation. Imaging Excellence is therefore liable for the infringements of both Brillinger's and the Archives' rights under s. 45(1) of the *Code*.

At the outset of this hearing it was agreed that it was appropriate that I make a finding on whether there had been a breach of the *Code*. I would then hear argument on the appropriate remedy and the Respondent's Constitutional challenge to the *Code*. The arguments with respect to remedy and on the Constitutional issues will proceed on October 25, 26 and 27, 1999.

Dated at Toronto this 29th day of September, 1999.


Heather M. MacNaughton
Chair, Board of Inquiry

1. The first part of the document is a list of the names of the members of the committee.

2. The second part of the document is a list of the names of the members of the committee who have been elected to the office of chairman.

3. The third part of the document is a list of the names of the members of the committee who have been elected to the office of secretary.

4. The fourth part of the document is a list of the names of the members of the committee who have been elected to the office of treasurer.

5. The fifth part of the document is a list of the names of the members of the committee who have been elected to the office of clerk.

6. The sixth part of the document is a list of the names of the members of the committee who have been elected to the office of auditor.

7. The seventh part of the document is a list of the names of the members of the committee who have been elected to the office of assessor.

8. The eighth part of the document is a list of the names of the members of the committee who have been elected to the office of collector.

9. The ninth part of the document is a list of the names of the members of the committee who have been elected to the office of recorder.

10. The tenth part of the document is a list of the names of the members of the committee who have been elected to the office of clerk.

11. The eleventh part of the document is a list of the names of the members of the committee who have been elected to the office of auditor.

12. The twelfth part of the document is a list of the names of the members of the committee who have been elected to the office of assessor.

13. The thirteenth part of the document is a list of the names of the members of the committee who have been elected to the office of collector.